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Peters, R.G.P.

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In Search of Lost Reality Croce's Philosophy of Law

Review of: Giovanni Perazzoli, *Benedetto Croce e il diritto positivo. Sulla 'realtà' del diritto*, Bologna, Il Mulino, 2011, 204 p., ISBN: 978-88-15-13996-2, €28,00.

Rik Peters

In Italy and even more so abroad, Benedetto Croce is primarily known as a philosopher of art and history. As such, most interpreters have focused on his aesthetics and theory of history, while only a few have dealt with Croce's practical philosophy and even still fewer with his philosophy of law. Among these few, however, number the great names of Dario Fucci, Gennaro Sasso and Giovanni Sartori.

With his book, Giovanni Perazzoli not only continues this small but important tradition in Crocean studies, but also extends it considerably by comparing Croce's thought with many other prominent philosophers of law such as his contemporaries Rudolf von Jhering, Hans Kelsen, Georg Jellinek and Vilfredo Pareto, as well as modern thinkers such as H.L.A. Hart, Hannah Arendt and Giorgio Agamben. Moreover, Perazzoli's central claim - that Croce failed to establish the reality of the law - interestingly connects to critical studies of Croce's theory of the genres in his aesthetics, and of his theory of the pseudoconcepts in his theory of history.¹

Perazzoli's starting point is legal positivism. Though there are different currents in this school of thought, most of its representatives hold that there is no other law than that of the existing rules and norms (p. 3). On this basis, legal positivists in the 19th and 20th centuries greatly contributed to legal studies by charting an enormous amount of rules, norms and laws in history. In spite of all these studies, however, they could not answer the question of the foundation of the legitimacy of the laws.

Facing this problem, legal positivists have tried to establish the foundations of the law in many different ways, for example in a 'basic law,' or in the concept of the state. In his book, Perazzoli convincingly argues that all these attempts failed because legal positivists necessarily presupposed a metaphysics which they rejected in practice (vii). Perazzoli also rightly observes that legal positivists tended to explain away the relationship between the will and the law; when the law is founded

¹ See, for example: L. Pennings, *I generi letterari nella critica italiana del primo Novecento*, Franco Cesati Editore, Firenze, 1999. Also: M. Maggi, *La logica di Croce e altri scritti*. Bibliopolis, Napoli, 1994.

on a basic law, or on the state, it can no longer be viewed as the collective decision of a group of individuals endowed with a particular will (p. XIV).

Regarding this point, Perazzoli brings Croce into the discussion, astutely arguing that he held a precarious middle position. On the one hand Croce agreed with the legal positivists that there is no law but the law in force. On the other hand he rejected the positivists' attempts to found the law on an a priori concept. For Croce *real* law could only be viewed as a product of the will, which means that laws are not true but useful, or, in Croce's language: laws are not true concepts which express reality but, rather, are pseudoconcepts or fictions.

In this context, Perazzoli rightly observes that this thesis left Croce in an awkward position, because if all rules and laws are merely useful, it is no longer possible to make a significant distinction between the rightfulness of a Constitution, the law of the mafia or the rules of a literary club (p. XL). In order to escape from this position, Perazzoli observes, Croce sought to ground the reality of the pseudoconcepts as fictions; that is, he tried to show that even though the pseudoconcepts are fictions, they still retain reality as fictions.

According to Perazzoli, Croce's attempt to save the reality of the pseudoconcepts failed, because 'nel trascendentale non c'è tempo, non c'è molteplicità, o conflitto. Non c'è accordo o disaccordo. Non ci sono individui'. In short: 'nel trascendentale non c'è volontà' (p. 188). In other words: after grounding law in economic activity, Croce sought to ground economic activity in a transcendental concept of reality, yet, as economic activity is always time-bound it cannot be grounded in a timeless reality.

Perazzoli's criticism pierces the heart of Croce's philosophy but also raises a question about its interpretation. Along with Luigi Scaravelli, Perazzoli seems to have adopted a Parmenidean reading of Croce's philosophy. According to this reading, Croce strictly separated the historical from the transcendental ruled by the $A = A$ of reason (p. 46, p. 191). From this viewpoint, Perazzoli is definitely right that Croce's attempt to ground the reality of the pseudoconcept in the transcendental was bound to fail, because being historical and time-bound the pseudoconcept cannot also be transcendental and timeless.

But Croce can also be read as a philosopher who tried to reconcile the historical and the transcendental in a unified view of reality as history. From this viewpoint, expounded by Croce in his *Logica* as the identity of history and philosophy the *a posteriori* and *a priori*, *vérités de fait* and *vérités de raison*, the historical and the transcendental no longer mutually exclude, but rather presuppose, each other. It follows then, that the transcendental is not outside history, but immanent in history, which amounts to saying that each period in history has its own notion of the transcendental. But even in this interpretation, Croce's attempt to ground the pseudoconcepts in reality was not completely successful, as he was never able to show how they developed in a rational way.

In the end, Croce did not find the logic of fictions he had so long sought. In spite of this failure, Croce's attempt is still worthy of being elaborated upon into a theory which explains how reality and fiction relate to each other. For anyone who wants to go beyond Croce in this field, Perazzoli's book serves as an obligatory starting point.

Rik Peters

Rijksuniversiteit Groningen, Instituut voor geschiedenis
Kamer 13-11-0529, Postbus 716, 9700 AS, Groningen (The Netherlands)
r.g.p.peters@rug.nl